

The Mount Sinai Hospital and 1199 National Health and Human Service Employees Union, Petitioner. Case 2–RC–21684

July 20, 1998

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND HURTGEN

The National Labor Relations Board has considered the determinative challenge in an election held May 23, 1996, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 5 against the Petitioner, with 1 challenged ballot.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs, and adopts the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The hearing officer found that senior cardiac catheterization specialist, Ana Gonzalez, was a supervisor within the meaning of Section 2(11) of the Act, and therefore recommended that the challenge to her ballot be sustained. The hearing officer found Gonzalez to be a supervisor in view of Gonzalez' evaluation of probationary employee Wilfredo Gaerlan. For the reasons set forth below, we find, contrary to the hearing officer, that Gonzalez' evaluation of Gaerlan is insufficient to establish supervisory status.

The Employer operates a cardiac catheterization laboratory in its hospital facility. Pursuant to a requirement of the Joint Commission of Accreditation of Health Care Organizations, the Employer evaluates all newly hired patient care employees at the conclusion of a 3-month probationary period. In late June 1996, after the election had taken place, Gonzalez, at the request of the Employer's Administrator Margaret Cheng, prepared such an evaluation of cardiovascular technician Wilfredo Gaerlan, a new employee whose 3-month probationary period was about to expire. Cheng testified that, although Gaerlan was nearing the end of his 3-month probationary period at the time Gonzalez prepared the evaluation, it usually takes about 6 months to completely train a new cardiovascular technician to cover all of the responsibilities of that position.

Gonzalez' preparation of Gaerlan's evaluation involved discussions with Cheng concerning Gaerlan's performance, and the submission of written notes to Cheng which responded to certain questions that are set forth on the Employer's new employee appraisal

forms.¹ Relying on both the oral and written information provided by Gonzalez, Cheng typed the answers to the questions on the appraisal form, including checking the box on the form marked "YES" in response to whether Gaerlan should continue to be employed. Cheng's typed answers included a paragraph explaining that a cardiovascular technician requires 6 months of training, that Gaerlan had progressed well over his first 3 months but still required an additional 3 months of training, that Gaerlan's probationary period would be extended for another 3 months, and that he would receive another evaluation when he finished his training at the end of that 3-month period.

Prior to working on Gaerlan's evaluation, Gonzalez had not been involved in the preparation of any employee evaluations.

The hearing officer found that Gonzalez exercised independent judgment in preparing Gaerlan's evaluation and had effectively recommended that Gaerlan's probationary status be extended for 3 months. From this conduct, the hearing officer concluded that Gonzalez evaluates employees, has the authority to make recommendations affecting employees' employment status, and therefore is a statutory supervisor. Accordingly, the hearing officer concluded that the challenge to her ballot should be sustained. We disagree.

It is well established that the ability to evaluate employees, without more, is insufficient to establish statutory supervisory authority. *Passavant Health Center*, 284 NLRB 887, 891 (1987). This factor has been deemed unpersuasive in the absence of evidence that an employee's job was ever affected by such an evaluation. *Manor West, Inc.*, 311 NLRB 655, 663 (1993).

In *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764, 764–765 (1995), the Board found that certain field training officers were not statutory supervisors even though they evaluated new paramedics and made effective recommendations as to whether the paramedics should be retained for further training or advanced to solo status. In finding the evaluations and recommendations insufficient to establish supervisory status, the Board noted that there was no evidence the recommendations would necessarily lead to permanent employment or to a change in pay status, or would have any other impact on the employees' job status.

Similarly, the record fails to show that Gonzalez' evaluation of Gaerlan included any recommendations that would necessarily impact the employee's ultimate job status. Indeed, there has been no showing that Gonzalez' evaluation of Gaerlan led to a wage change,

¹ The questions ask for information about the employee's skills and areas in which the employee's performance could be improved. For employees in patient care related jobs, the form asks that a recommendation as to the employee's continued employment be made by marking a box on the form labeled "YES," "NO," or "CONDITIONAL."

to permanent employment, or to any other change in Gaerlan's status.

The hearing officer placed considerable emphasis on the fact that Gonzalez recommended Gaerlan continue on probation for another 3 months and be evaluated again at the end of that period. As noted above, however, Gaerlan had only completed 3 months of training at the time of his evaluation, and it usually takes 6 months to completely train a new cardiovascular technician such as Gaerlan. Thus, it is apparent that Gonzalez recommended nothing more than the continuation of Gaerlan's training and probationary status until the end of the usual 6-month training period. As the Board held in *Harbor City*, supra, recommendations of this kind do not constitute the type of personnel decisions that establish statutory supervisory authority.

Moreover, we find it significant that the conduct relied upon by the hearing officer in finding supervisory status occurred after the election. Indeed, there has been no showing that, prior to the election, Gonzalez had ever prepared employee evaluations. As a general rule, the Board does not determine voter eligibility based on evidence of events that occurred after the election. *Georgia-Pacific Corp.*, 201 NLRB 831, 832 (1973). Thus, the fact that the Employer did not have Gonzalez prepare an employee evaluation until after the election had taken place, and after her determinative vote had been challenged, casts further doubt on the contention that Gonzalez' evaluation of Gaerlan is indicative of statutory supervisory status.

In adopting the hearing officer's finding that Gonzalez' authority to evaluate probationary employees establishes supervisory status, our dissenting colleague essentially relies on two record facts. First, he relies on the fact that employee Gerry Marin—who filled in for Gonzalez while she was on maternity leave from April 1994 through January 1995—worked on three competency evaluations, one of which included a recommendation that a probationary employee be converted to permanent status.² The record fails to show, however, whether Marin—in his acting capacity—made an effective recommendation in this regard or, conversely, whether the recommendation was subject to the independent review of the Respondent's administrator, Margaret Cheng.³ In the absence of evidence

of an effective recommendation by Marin, we find that Marin's involvement in the evaluation process is insufficient to confer supervisory status upon Gonzalez.

Second, our colleague relies on Cheng's testimony that she informed Gonzalez that—in evaluating Gaerlan—Gonzalez had the option of recommending the continuation of Gaerlan's probationary status, or alternatively, recommending Gaerlan's termination or conversion to permanent status. The record shows, however, that this conversation occurred in the course of preparing Gaerlan's evaluation, which, as noted above, occurred after the election. Accordingly, it is postelection conduct that has no bearing on Gonzalez' eligibility to vote. *Georgia-Pacific Corp.*, supra.⁴ In addition, there has been no showing that any recommendation for termination or conversion to permanent status would be followed by Cheng without an independent review, and thus no showing that such a recommendation would be "effective" within the meaning of Section 2(11).

Our colleague would also find, contrary to the hearing officer, that Gonzalez is a supervisor in view of her assignment of work to employees in emergency situations. We find no merit to this contention and adopt the hearing officer's finding that this conduct does not establish supervisory status.⁵

In sum, we find that the evidence fails to establish that Gonzalez is a statutory supervisor, and thus the challenge to her ballot should be overruled. Accordingly, we shall remand the case to the Regional Director for the purpose of opening and counting the challenged ballot and for further appropriate action.

establish that Cheng did not independently review Marin's recommendations or that any such recommendation was effective.

⁴Our colleague attempts to diminish the significance of the fact that this conversation occurred postelection by asserting that, prior to the election, Gonzalez was "aware" that her role in the preparation of such evaluations could affect the employment status of probationary employees. We find no record support for our colleague's assertion. He relies largely on the speculative assertion that it is "inconceivable" that Gonzalez was unaware of her ability to effectively recommend a change in the employment status of probationary employees. This, however, does not supply the missing support. The few "facts" he cites clearly fail to establish an awareness of such authority with respect to evaluations.

⁵See *Illinois Veterans Home at Anna L.P.*, 323 NLRB No. 161, slip op. at 2 (June 6, 1997), where the Board found that the limited authority of the RNs to assign and direct employees when special tasks arise, such as when a resident develops a fever, is not indicative of supervisory status. Our colleague asserts that that case is distinguishable because the assignments there "involved procedures within the normal range of duties of certified nurses' aides." There is nothing in the record, however, showing that Gonzalez' assignments involve tasks outside the employees' normal range of duties. Consequently, we fail to see how our colleagues' assertion provides any meaningful basis for distinguishing that case from the instant one.

We also adopt the hearing officer's finding that Gonzalez' other duties are not sufficient to establish supervisory status.

²The other two evaluations included the usual recommendation of continued probation.

³Our colleague asserts that Cheng's lack of a technical background establishes that she did not independently review Marin's recommendations that the employees either continue in probationary status or convert to permanent status. We disagree. Although Cheng's lack of a technical background may be indicative of Marin's technical advice or input, it does not establish the absence of any meaningful independent review of Marin's recommendations. In addition, our colleague's speculation, that an independent review by Cheng "would not be inconsistent with an effective recommendation to Cheng," does not affirmatively establish that an effective recommendation was made to Cheng. In our view, the record fails to

DIRECTION

IT IS DIRECTED that the Regional Director for Region 2 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Ana Gonzalez. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I find that Senior Cardiac Catheterization Specialist (SCCS) Ana Gonzalez is a Section 2(11) supervisor who was ineligible to vote in the election. Accordingly, I would sustain the challenge to her ballot and certify the results of the May 23, 1996 election.

It is well settled that individuals are statutory supervisors when they evaluate others in circumstances where the evaluations lead to personnel actions affecting the appraised employees, such as the grant of merit increases, or the determination that the rated employees will be retained, discharged, or placed on probation. See generally, *Northcrest Nursing Home*, 313 NLRB 491, 498 fns. 36, 37 (1993). The determinative factor in assessing the evaluator's supervisory status is whether the evaluations impinge on the rated employees' job status. *Manor West, Inc.*, 311 NLRB 655, 663 (1993). Under this standard, I agree with the hearing officer that Gonzalez is a supervisor based on her authority to undertake competency evaluations.

The record establishes that, in November 1993, Gonzalez was selected for the newly created SCCS position. In this position, Gonzalez was responsible for performing accreditation-required competency evaluations on cardiac catheterization specialists (CCSs), 3 months after their hire.¹ These competency evaluations assess: the individual CCS's skills, i.e., the tasks the employee can or cannot perform; areas requiring improvement; employee strengths; and how the employee interrelates with other workers. The competency evaluation directly affects the rated employee's employment status. Thus, the competency evaluations determine whether the assessed employee will be terminated, converted to full-time employment, or extended in probationary status.

Shortly after her selection for the SCCS position, Gonzalez went on maternity leave from about April 1994 until January 1995. During this leave, CCS Marin was temporarily promoted to Gonzalez' SCCS position. As acting SCCS, Marin completed competency evaluations on three employees. Marin recommended that one employee be converted to perma-

nent status and that the other two have their probationary periods extended. Marin's recommendations were followed by management. Indeed, as found by the hearing officer, only the SCCS has the technical expertise to evaluate the competence of recent CCS hires.

Upon her return from maternity leave, Administrator Cheng informed Gonzalez that she was responsible for performing competency evaluations, including one for new CCS employee Gaerlan. Gaerlan was the first CCS hired while Gonzalez was employed and working in the SCCS position. Cheng informed Gonzalez that, in evaluating Gaerlan, Gonzalez had the option of recommending his termination, his conversion to permanent status, or his extension as a probationary employee.

In preparation for evaluating Gaerlan, Gonzalez revised the evaluation form for competency evaluations and worked with Gaerlan to assess his performance. At the conclusion of Gaerlan's first 3 months of employment, Gonzalez completed his competency evaluation. Gonzalez recommended that Gaerlan be retained as a probationary employee and be reevaluated 3 months later. This recommendation was followed.

The majority argues that the record does not establish that Marin's or Gonzalez' recommendations were effective, i.e., that they were adopted without independent review by Administrator Cheng. I disagree. As to Marin, the evidence amply establishes that he made effective recommendations. Thus, the record shows that Marin undertook the evaluations, compiled the information recorded on the forms, and recommended—as the appraising individual that certain action be taken. The record also shows that this action was taken. Similarly, as to Gonzalez, the record shows that she undertook the evaluation of Gaerlan and, based on her assessment, recommended that his probation be extended. Again, this recommendation was followed. With respect to whether Cheng independently reviewed either Marin's or Cheng's recommendations, the record establishes that Cheng (as well as Gonzalez' immediate supervisor, Weinstein) lacked the technical background to gauge the competency of catheterization specialists (Marin and Gonzalez, respectively) for this purpose.²

Finally, even if Cheng did some independent review, that would not be inconsistent with an effective recommendation to Cheng. The fact that a decision maker

¹The Employer claims that Gonzalez was informed in November 1993 that she was responsible for the competency evaluations. Although the record is not clear on this point, Gonzalez admits that, by at least March 1995—shortly after her return from maternity leave—she was informed of this responsibility.

²I find unpersuasive the majority's argument that Cheng's lack of technical expertise does not establish that she failed to conduct a meaningful, independent review of SCCS competency recommendations. I believe that the weight of the evidence demonstrates precisely that. Thus, not only does Cheng concede that she lacks the technical background to evaluate the competency of CCS employees, but she testified that the SCCS conducts such evaluations, and the proffered recommendations are followed. Significantly, Cheng also testified that it is the SCCS who is ultimately held accountable for the competency of newly hired CCS employees.

may wish to make her own inquiry into a matter does not mean that she eschews reliance on the recommendation.

The majority concedes that Cheng informed Gonzalez that she (Gonzalez) had the authority to make recommendations concerning the status of Gaerlan. However, the majority contends that this conversation took place after the election, and that there is no record evidence that Gonzalez was aware of her authority to affect employee status (i.e., by recommending their termination, conversion to permanent status, or extension of the probationary period) prior to that time. In so arguing, the majority, in my view, ignores all of the facts above. Those facts clearly show that well before the election, persons holding the SCCS position (Gonzalez and Marin) were well aware that they were responsible for evaluating employees, that Marin filled out forms assessing employees under the three options, and that Gonzalez revised the forms that Marin had used for the probationary reviews. Under these facts, it is inconceivable that Gonzalez could have been unaware that her evaluations of probationary employees would result in termination, conversion to permanent status, or an extended probationary period.

Under these facts, I agree with the hearing officer that Gonzalez is a Section 2(11) supervisor based on her authority to perform CCS competency evaluations. Thus, I find that Gonzalez directly affected CCSs' job status by her ability to effectively recommend termination, permanent employment, or extended probationary status. The fact that Gonzalez recommended continued probationary status for Gaerlan, rather than the other available options, is consistent with that authority.

In denying her supervisory status, my colleagues place particular significance on the fact that Gonzalez completed Gaerlan's competency evaluation after the election. I disagree. What is relevant is that at all times since establishment of the SCCS position—which establishment substantially predated the election—the SCCS has been authorized to and, indeed, has completed CCS competency evaluations. Gonzalez' replacement did so during her maternity leave, Gonzalez was informed that this was her responsibility, and Gonzalez promptly resumed these duties upon her return to work in early 1995. Under these circumstances, the fact that Gaerlan's evaluation was not due until after the election neither diminishes Gonzalez' author-

ity nor renders Gaerlan's evaluation irrelevant.³ Accordingly, I would find Gonzalez to be a supervisor based on her authority to evaluate CCSs.

Finally, contrary to my colleagues and the hearing officer, I would additionally find Gonzalez to be a supervisor based on her use of independent judgment in assigning work to CCS employees. Thus, as found by the hearing officer, Gonzalez was responsible, in the event of an emergency, for making personnel assignments. Specifically, during these regularly recurring emergencies, Gonzalez is required to decide which CCSs to assign to perform which procedures. Her decision is based on her own knowledge of the CCSs' expertise and experience on the equipment. Gonzalez' decision, which necessitates her consideration of a number of subjective factors, and which does not need approval, is quintessentially the exercise of independent judgment. Thus, I would additionally find Gonzalez a supervisor on this basis.⁴

³ *Georgia-Pacific Corp.*, 201 NLRB 831 (1973), on which the majority relies is distinguishable. In that case, which involved whether students were temporary or regular part-time employees, there was no evidence that the students knew prior to the election that they would be retained as part-time employees. Here, conversely, the record established that prior to the election that Gonzalez was responsible for performing competency evaluations and had taken steps in furtherance of this responsibility.

Further, I find that *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995), on which my colleagues rely, is distinguishable. In *Harbor City*, the evidence failed to establish that the FTO's evaluations signaled the end of the rated employee's probationary period, led to the rated employee's permanent employment, or that the FTO's recommendation for additional training affected the evaluated employee's job status.

⁴ My colleagues rely on *Illinois Veterans Home of Anna L.P.*, 323 NLRB No. 161 (June 6, 1997). I did not participate in that decision. I do not pass on the majority finding in that case that registered nurses' assignment and direction of CNA work was insufficient to establish supervisory status. In any event, however, I find that case distinguishable. In *Illinois Veterans*, the assignments involved procedures within the normal range of duties that the certified nurses' aides (CNAs) were expected to perform and generally involved assignments to the CNAs who customarily worked in the specific area of the hospital. Here, however, the cardiac catheterization specialists (CCSs) perform diverse complex procedures using technical medical apparatus. Not every CCS is capable of working in each catheterization room. Training is required to operate the various types of complex equipment. Gonzalez must decide when CCSs are sufficiently trained so that they can work alone. Also, even once trained, CCSs develop varying proficiencies on the different equipment. Thus, in emergency assignments, (or, according to the hearing officer, when staff-power needs dictate), Gonzalez is required to assess the CCSs' expertise and experience on the specific equipment to be operated, and she takes this into account when assigning and reassigning work. In my view, her actions clearly constitute an independent assignment of work.